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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, *Plaintiff-Appellee,*	Opn 2-3-09 COA No. 269505 Rec 4-3-09 Saginaw Case No. 04-24765-FH Saginaw Case No. 02-21097-FH Saginaw Case No. 05-025865-FH
v	
TOD KEVIN HOUTHOOFD, a/k/a TODD KEVIN HOUTHOOFD *Defendant-Appellant.*	Hon. Lynda L. Heathscott

Patrick Duggan (29978) Saginaw County Prosecutor's Office 111 South Michigan Street Saginaw, MI 48602 (517) 790-5330 *Attorney for Plaintiff-Appellee*	Michael Skinner (P62564) Law Offices of Michael B. Skinner 27 East Flint Street Lake Orion, MI 48362-3222 (248) 693-4100 *Attorney for Defendant-Appellant*

APPLICATION FOR LEAVE TO APPEAL

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I. JUDGMENT APPEALED FROM

Mr. Houthoofd appeals from the judgment of sentence entered in the Saginaw County Circuit Court on March 21, 2006, and affirmed in part by the Court of Appeals in an opinion dated February 3, 2009. The court denied reconsideration on April 3, 2009. This Court has jurisdiction over this case under MCR 7.301(A)(2) as an application for leave to appeal from a decision by the Court of Appeals.

II. Relief Sought

Defendant-Appellant, Tod Houthoofd, prays that this Court:

(1) Vacate his convictions;

(2) Remand for a new trial; or

(3) Remand for a resentencing.

III. Reasons for Granting Leave to Appeal

Because this Court is not primarily an error-correcting Court, MCR 7.302(B) establishes the grounds under which this Court considers and grants applications for leave to appeal. Mr. Houthoofd's case falls under two of these grounds. First, under MCR 7.302(B)(3), the issues in this case involve legal principles of major significance to Michigan's jurisprudence. There is a conflict in current Court of Appeals case law regarding the interpretation of MCL 762.8, the felony venue statute applicable in this case. The panel in the case at bar tried to reconcile the case law, but it did not

correct the root cause which is that there are post-1990 Court of Appeals decisions that contradict the plain meaning of 762.8. These cases permit prosecution in a county where the "effects" of a felony are felt, whereas 762.8 itself allows only for prosecution in a county where acts in perpetration of the felony are committed. The Court of Appeals recognized that this was an erroneous interpretation in *People v Webbs*, 263 Mich App 531 (2004), but the panel in the case at bar has perpetuated the error by again interpreting 762.8 contrary to its plain language.

Second, under MCR 7.302(B)(5), the decision of the Court of Appeals is clearly erroneous and will cause material injustice. Regarding the venue issue, if the Court of Appeals had properly interpreted 762.8, it would have vacated Mr. Houthoofd's intimidation of a witness conviction. Because of the extreme upward departure sentence Mr. Houthoofd received, he must serve at least four more years on this intimidation sentence, possibly as many as nine years. If the rule of 762.8 were properly enforced, he would likely not have to serve any more time in prison. This is a miscarriage of justice. In addition, the remaining issues raised at the Court of Appeals were also incorrectly decided by the court, but Mr. Houthoofd relies on the discussion of those issues in this application to support that claim.

IV. Statement of Questions Presented for Review

1. Where the plain meaning of the venue statutes does not permit prosecution in a county where the "effects" of a crime are felt or suffered and due process requires prosecution in the proper venue, whether Saginaw County was an improper venue for the intimidation of a witness charge where the prosecution was based solely on the effects of the alleged crime in Saginaw County?

2. Whether the Court of Appeals erred in not ordering a new trial where it vacated one of Mr. Houthoofd's convictions

3. Whether the trial court erred and violated Mr. Houthoofd's due process right to a fair trial by permitting the prosecution to introduce the kitchen sink material on the theory that Detective VanHorn's knowledge of these acts caused him to feel threatened or intimidated?

3. Whether there was insufficient evidence to convict defendant of false pretenses over $100 where the crime requires that the victim intend to pass title as well as possession, and the victim in this case did not intend to pass title because he was operating a rental equipment store.

4. Whether the prosecutor committed prosecutorial misconduct and deprived Mr. Houthoofd of his due process right to a fair trial in closing argument.

5. Whether Defendant was denied his constitutional right to the

effective assistance of counsel where his trial attorney failed to object to the prosecution's improper closing argument.

6. Whether the trial court erred in sentencing Mr. Houthoofd to a minimum sentence that exceeded the scored guidelines range without legal justification for the departure or the extent of the departure.

7. Whether Mr. Houthoofd was denied his Sixth Amendment right where the trial court sentenced him based on facts not found beyond a reasonable doubt by a jury.

V. Statement of Facts

Defendant-Appellant, Tod Houthoofd, was convicted in a six week jury trial in January and February 2006, in the Saginaw County Circuit Court, the Honorable Lynda L. Heathscott presiding, of solicitation to commit murder (MCL 750.157b), intimidation of a witnesses (MCL 750.122), and obtaining property with a value over $100 by false pretenses (MCL 750.218). Mr. Houthoofd had one expunged conviction from 1983. *See* PSIR. The trial court sentenced Mr. Houthoofd to an upward departure sentence of 40 to 60 years' imprisonment on the solicitation to commit murder charge, 10 to 15 years' on the intimidation charge, and 5 to 10 years' on the false pretenses charge. On appeal, the Court of Appeals vacated Mr. Houthoofd's solicitation conviction because prosecution in Saginaw County was improper according to MCL 762.8. *See* Exhibit A, COA Opinion.

The case against Mr. Houthoofd started with an incident in 1998. In that year, a man rented a tractor and rototiller from a rental equipment store in Saginaw County owned by Ed Wurtzel, Sr. and his son, Ed Wurtzel, Jr. The man identified himself as Colin Francis and

produced a driver's license under that name. The tractor and rototiller were never returned. Approximately three years later, under circumstances that will be discussed in more detail below, Colin Francis's driver's license was found in Mr. Houthoofd's possession. Mr. Houthoofd was charged with obtaining the tractor under false pretenses. That charge resulted in a hung jury in a trial in 2004. A retrial date was set, and the prosecutor informed defense counsel that he would not retry the case unless further investigation turned up new evidence.

On June 21, 2004, just days before the retrial was scheduled, the investigating officer, Detective Michael VanHorn, reported that he received a threatening phone call, and he identified the caller's voice as Mr. Houthoofd's. The prosecutor then charged Mr. Houthoofd with intimidation of a witness, and the retrial was postponed. Detective VanHorn subsequently received a similar phone call in July, but it was undisputed that Mr. Houthoofd did not make this call because he was in the county jail.

The final charge, solicitation to commit murder, arose from allegations from a jailhouse informant, Michael Dotson, that Mr. Houthoofd had solicited him to murder Ed Wurtzel, Jr. There was contrary evidence that Mr. Houthoofd called his attorney, Matt Reyes, when Dotson came to his home regarding the murder and conversations in which Mr. Houthoofd told Dotson not to murder Wurtzel. Mr. Reyes informed Arenac County Prosecutor Curtis Broughton of Dotson's contact with Mr. Houthoofd.

While there were multiple charges for multiple incidents, the length of the trial was primarily due to the introduction, over objection, of extensive testimony regarding other acts evidence admitted against Mr. Houthoofd. Det. VanHorn was the primary source of this evidence testifying to a series of allegations against Mr. Houthoofd, including hearsay testimony about the fear that some people had of Mr. Houthoofd and reading material seized from Mr. Houthoofd of a

threatening or violent nature. The allegations were so diverse and numerous that the parties in the trial court referred to it as the "kitchen sink" material.

The Tractor Case

Edward Wurtzel, Jr. was part owner of Central Rental in Thomas Township. T 1/26 pm 4. On April 13, 1998, a man rented a tractor-rototiller combination using a driver's license with the name Colin Francis. T 1/26 pm 6-10. Francis had misplaced his wallet earlier and his license and credit card were missing. T 1/25 am 55-58. The equipment was not returned. T 1/26 pm 13-14. Francis's driver's license was later found in Houthoofd's truck. T 1/19 90-98.

During a line-up in 2001, Wurtzel identified Houthoofd as the one who looked most like the man, but he was not positive. T 1/26 pm 44-45. The VIN number of the tractor that Wurtzel reported as stolen matched the VIN number of a tractor that he sold on March 10, 1998, to Michael Wheeler. T 1/26 pm 50-54. Ed Wurtzel, Sr. testified that the fact that the tractor that he had reported stolen had actually been sold to Mike Wheeler was an administrative error. T 1/27 115.

Lt. Yancer was in charge of the tractor investigation. T 1/27 23-24. During the first trial in 2004, Houthoofd testified that he had bought the tractor through a Delta College yard sale and that he found the license of Colin Francis in the tractor. T 1/27 52-53, 59. Houthoofd bought the tractor for about $11,000 from someone representing himself as Denny VanHaaren, and Lt. Yancer had seen a copy of the receipt. T 1/27 33-74. Donald VanHaaren, the father of a "Denny Van Haaren" in the area, testified that his son died in 2001 and had not been back to Michigan since 1994. T 1/27 15-20. The trailer was recovered at Delta College and returned to Wurtzel. T 1/27 77.

Matthew Reyes was Mr. Houthoofd's attorney in the first tractor case. T 2/2 pm 50. The tractor case went to trial in 2004 and resulted in a hung jury; the prosecutor, Patrick Duggan, told

Reyes that the case would not be retried by Saginaw County unless further investigation determined that it was worthwhile to retry. T 2/2 pm 54-55.

Threatening Phone Calls

On June 21, 2004, the officer-in-charge of the tractor case, Det. Michael VanHorn received a page at around 4:15 p.m. T 1/19 9-10. VanHorn called the number and the man on the other end said, " I want to let you know I saw you in court last week, and I want to let you know that I know where you live motherfucker." T 1/19 10-11. In the original incident report, VanHorn said he heard a male voice and he only later identified it as Houthoofd's. T 2/8 150.

Detective Sergeant Don Rauschenberger was assigned to investigate the threat. T 1/20 56. Rauschenberger got records for the cell phone used to place the call, and they disclosed that in addition to VanHorn's number, calls were also placed to the GM call center, Roberta Haertel (Houthoofd's girlfriend), and to a Papa John's Pizza that was located on the same street that Haertel lived on. T 2/8 20-26. He searched Haertel's apartment and found a piece of paper that had the name "Phil" listed and a phone number. T 2/8 43. The Verizon records disclosed that one of the calls made was to Phil Losee. T 2/8 42. A Verizon representative testified that none of the calls originated or terminated in Saginaw. T 2/1 264. There were no orders placed at Papa John's Pizza for Houthoofd or Haertel and the Papa John's was about a mile from the GM work center. T 2/8 163.

In July 2004, VanHorn received another call directly to his cell phone. T 1/20 71. It was a male voice that he did not recognize saying, "Hey motherfucker, I know where you live, motherfucker," several times. T 1/20 73. VanHorn could not identify the caller in the July 12th call. T 2/8 86. The originating telephone number for the second call was a pay phone in a trailer

park in Bay City. T 2/8 94. When the second call was made, Houthoofd was in the Saginaw County jail and Houthoofd could not have made the call. T 2/8 98.

Reyes also represented James Franklin on a charge of CSC in Bay County. T 2/2 pm 56. During Franklin's trial, VanHorn asked that his address not be put on the record because Reyes represented Houthoofd. T 2/2 pm 74. Reyes wanted to present this information in Houthoofd's case as a witness. T 2/2 pm 74. Reyes believed that it was equally likely that Franklin made the threatening phone call. T 2/2 pm 83. Franklin had been a client of Reyes for a long time and Franklin's voice was so similar to Houthoofd's that they were hard to tell apart. T 2/2 pm 103-104.

VanHorn did not think that it was Franklin who made the call. T 1/20 79. But he said it was possible that the voice in the second call was Franklin's. T 1/20 219. VanHorn had previously told Rauschenberger that the July 12th phone call could have been Franklin's voice. T 2/8 155. As to the June 21st call, VanHorn had been in court the week before with Franklin. T 1/20 80.

Phil Losee testified that on June 21, 2004, he received a weird phone call. He had been having problems with a previous girlfriend so he had been documenting his phone calls. T 2/2 213. At approximately 3:30 on June 21st, he received a phone call asking for Houthoofd's number. He was reluctant to give the number and the person explained to him that he called several places like the GM call center and Haertel.. The caller told Losee that he had information about Houthoofd's tractor trial. Losee gave him the number. T 2/8 217-18.

Solicitation of Murder

Michael Dotson was with Houthoofd in the Arenac County Jail in late 2001. T 2/1 60. Dotson claimed Houthoofd talked to him about his case and told Dotson that he knew he was

guilty and caught, and that he had to go another step to take care of his problems. T 2/1 65. He wanted the windows blown out of his wife's boss's house. T 2/1 66. Houthoofd paid Dotson about $200 into his jail account and that helped him get bonded out. T 2/1 70. Houthoofd had made a diagram of the house in jail and Dotson took it home with him. T 2/1 69-72. After the line-up in the tractor case, Houthoofd was discussing the tractor case with Dotson and he said that he wanted Wurtzel "smoked," by which he meant killed. T 2/1 74-75. Dotson said that he would charge a few thousand dollars for this. T 2/1 75.

When he got out, Dotson did not shoot out the windows but instead asked Houthoofd for $200 more, which Haertel brought to him. T 2/1 81-82. After Houthoofd bonded out, they met at Houthoofd's house in a pole barn. T 2/1 88. At that time, Houthoofd told him that he did not want Wurtzel killed. T 2/1 89. In January 2002, Reyes got a phone call from Houthoofd at night. T 2/2 pm 105. Houthoofd was concerned about a phone call that he had got from Dotson asking him about money and solicitation; Houthoofd wanted to call the police but Reyes told him that it was the police trying to set him up and not to bother. T 2/2 pm 104-105.

By March 2002, Dotson was back in jail and he was visited first by Trooper Jim Moore and later by Moore and VanHorn. T 2/1 94. The conversation was tape recorded and he admitted that at some point Houthoofd told him, "Back off. Don't worry about the guy in Saginaw. Let him go. My attorney can deal with that." T 2/1 98-99. Dotson tried to call Houthoofd a couple times from jail, and also wrote a letter to him but never got a response. T 2/1 102-03. He had a conversation on the telephone with Houthoofd on a recorded line. Houthoofd told Dotson to forget about the Wurtzel killing. T 2/1 103-05. Dotson said that he had some paperwork at his house on the refrigerator about the solicitation to shoot out the windows. T 1/20 18; T 2/1 108-11. VanHorn went to the house and retrieved a supplemental police report regarding the Meagher

shooting (discussed below) and the tractor. T 1/20 23.

Dotson did not know Wurtzel's name, what he looked like, and did not know anything about him other than that he was a white man. T 2/1 131-32. Houthoofd never gave him any money for the Wurtzel job. T 2/1 137-38. Dotson testified that when he talked to Houthoofd in the barn he said that the Saginaw job was going to cost a lot more than the Bay City job, but Houthoofd never gave him any money for that. T 2/1 160-69. The Arenac County prosecutor, Curtis Broughton, declined to charge Houthoofd because he was not comfortable with Dotson as a witness. T 1/20 32-35.

"Kitchen Sink" Material

The kitchen sink material consists primarily of other acts allegedly committed by Mr. Houthoofd, reading material and other items seized from Mr. Houthoofd, and opinion testimony regarding Mr. Houthoofd's character. Admissibility of this evidence was addressed in a memorandum of law (referred to as the "kitchen sink memo" during the proceedings) filed by the prosecution on September 17, 2004. The trial was filled with testimony regarding this material, and what follows in a short summary of the most significant material.

Jodi Meagher Shooting

Probably the most often referred to kitchen sink incident was the shooting at the house of Jodi Meagher, a fellow employee of Mr. Houthoofd on management side at GM. On November 25, 2001, Meagher's window at her home was shot out. Houthoofd was on leave from GM at that point and GM had hired a security firm to surveil him. T 1/27 200, 204. There was no physical evidence tying Houthoofd to the Meagher shooting. T 1/20 181. Nevertheless, he was a suspect; and the police arrested him in the GM parking lot that night, and Trooper James Moore and VanHorn questioned Houthoofd about the shooting. T 2/1 188-89. They also searched his truck

and found a .22 caliber pistol and a 30-30 rifle, but no shotgun; Houthoofd had a concealed weapons permit. T 2/1 192-95, 231. Rauschenberger testified using a map of possible routes that Houthoofd could have taken from his house to the GM plant and that Meagher's house was on the route. T 2/3 208-09. Nevertheless, the shooting at Meagher's house is still an open case. T 2/3 216-18.

Pipe bombs

VanHorn got a search warrant for matters relating to the shooting and the tractor. T 1/19 152-53. The affidavit to the search warrant was admitted and it contained a history of accusations of violent acts by Houthoofd. T 1/19 156-58. Page three of the affidavit dealt with pipe bombs and Mr. Houthoofd being put under surveillance by GM. T 1/19 159-60. Houthoofd's residence was searched and metal pipes consistent with pipe bombs were seized. T 1/19 193; T 2/1 204. A photo of a can of smokeless powder was admitted. T 1/19 202-04. Also admitted was a photo of a pipe bomb. T 1/19 204-09. The court admitted lab reports regarding the pipe bombs. T 1/19 212-18. The court admitted an ATF report analyzing the pipe bombs; it was disputed whether the reports actually identified the devices as bombs. T 1/19 218-22. VanHorn testified that the ATF report caused him to be concerned for his safety or anyone else's safety having to deal with Houthoofd if he was angry. T 1/19 223. The U.S. Attorney General declined to issue a warrant in the pipe bomb case. T 1/20 201.

Adulterated Medicine

VanHorn and special Agent Mark Trombley of the ATF interviewed Houthoofd's ex-wife, Jayne Houthoofd, about the pipe bombs. T 1/19 251. During their divorce, Jayne had asked for her diet pills back, and she and her daughter, Amanda, later found two small fish hooks in the diet capsules. T 1/19 254-56. The police did not find any fish hooks in the medicine, but some wood

splinters were found, and a DNA analysis on the wood splinters was inconclusive. T 1/19 258-63; T 2/3 221.

Joe Zaider's opinion of Houthoofd

VanHorn testified that Joe Zaider, a member of GM management, was afraid of Houthoofd. T 1/19 111. Zaider said Houthoofd was rude, cocky, and disrespectful. T 1/19 113. Zaider had received pages with "187" on them, which is code for murder or violence, after a confrontation with Houthoofd. T 1/ 19 114-15.

Matt Slough's opinion of Houthoofd

VanHorn testified that another GM supervisor, Matt Slough, felt that Houthoofd was manipulative and a liar. T 1/19 116-17.

Paul Schrock's opinion of Houthoofd

VanHorn also testified that Paul Schrock, who had received flight training from Houthoofd, thought that Houthoofd was sneaky, calculating, sharp, and very crafty. T 1/19 135.

Houthoofd's performance evaluation of Jamie Hart

Houthoofd was disciplined for writing a vulgar performance appraisal of his supervisor, Jamie Hart. T 1/27 144-48. The prosecution introduced the performance evaluation as an exhibit. T 1/19 136-38.

Reading material seized

Also introduced were numerous pieces of reading material – pamphlets and books – seized during police searches. These materials included the following: *How to Out Fox the Foxes, 297 Secrets the Law and Lawyers Don't Want You to Know*, *The Poisoner's Handbook,* and *How to Be Your Own Private Detective.* T 1/19 174, 179, 182. VanHorn read specific portions of *The Poisoner's Handbook.* T 1/25 118-124. VanHorn read some chapter headings in *How to Be*

Your Own Private Detective and a page from *How to Out Fox the Foxes*. T 1/25 125-32.

Houthoofd's expunged preparation to burn offense

Houthoofd had previously been convicted of preparation to burn but his record had been expunged. T 1/19 227.

Larry Houthoofd's opinion of Houthoofd

VanHorn said that Houthoofd's cousin, Larry Houthoofd, who was the complainant in the preparation to burn case, told him that he was afraid of Houthoofd and felt that Houthoofd was still intent on killing him. T 1/19 230-33. Larry had received death threat letters from Houthoofd. T 1/19 235.

Houthoofd's forging of GM document

VanHorn also investigated allegations by Jodi Meagher that Houthoofd had forged some GM documents, and Houthoofd was charged with a crime. T 1/19 249; T 2/1 21, 35. Houthoofd was represented by Reyes and was acquitted of those charges in 2003. T 1/19 250.

Houthoofd's attempted arson of his own home

Houthoofd was acquitted of an attempted arson at Houthoofd's own home in 2002. T 1/19 251.

Lee Houthoofd's opinion of Houthoofd

VanHorn testified that Lee Houthoofd told Trooper Teddy that he was afraid of Houthoofd, that he had a violent temper, and that Houthoofd was capable of killing. T 1/20 9-11. Lee told Trooper Teddy that Houthoofd said that he knew many ways to kill someone, dispose of the body, and cover evidence, and Lee felt that Houthoofd had some sort of fantasy about killing someone. T 1/20 12. Lee said that Irwin and Dorothy Houthoofd were potential targets of Houthoofd and that Houthoofd had mentioned targeting his superiors. T 1/20 13-14. One time when Houthoofd

was eighteen or nineteen, he was approached by a police officer about poaching deer and Houthoofd said he would rather kill the officer than go to jail. T 1/20 15. Lee told VanHorn that he was afraid and did not want to testify. T 1/20 16-17.

Houthoofd's confrontation with VanHorn during the first trial

During the first tractor trial, VanHorn saw Houthoofd in the hall and Houthoofd said, "Fuck off Van Horn, fuck off." Van Horn looked over his shoulder to make sure that he was not about to get whacked from behind because he was aware of weapons that will defeat a metal detector. T 1/20 51-52.

Assault on GM supervisor in Toledo

After Houthoofd was discharged from a GM plant in Toledo, his superior, Robert Griffith, suffered a physical injury for which Houthoofd was never charged. T 1/27 169-70. In 1997, Houthoofd was working at Bay City. A pipe bomb exploded at Griffith's home. T 1/27 172. . After learning about this, Meagher had a meeting with the human resources staff to discuss a contingency plan regarding Houthoofd if they felt they needed to involve outside resources. T 1/27 170. Houthoofd was never interviewed or arrested for the assault on Griffith in Ohio in 1994. T /20 209. Houthoofd was not interviewed or arrested regarding the bomb going off in Griffith's house three years later. T 1/20 210. Houthoofd's fingerprints were sent to Ohio for comparison against the assault on Griffith and there was no match. T 1/20 147.

Closing Argument, Verdict, and Sentencing

During closing argument, the prosecutor made numerous statements that are the basis of a prosecutorial misconduct claim on appeal. Those statements are transcribed below in the argument section.

The jury convicted Mr. Houthoofd of all three counts. The trial court sentenced Mr.

Houthoofd to forty to sixty years' imprisonment on the solicitation conviction, 10 to 15 years' on the intimidation conviction, and 5 to 10 years' on the false pretenses conviction.[1]

Remand Hearing

On remand from the Court of Appeals, the trial court held an evidentiary hearing over two days, requiring some summation of the testimony taken. The hearing was extraordinarily long for a hearing of its type because the trial court permitted the prosecution to question the defense attorneys at length about issues that, in Appellant's opinion, were irrelevant to the remand proceeding.

In any event, the relevant testimony can be easily summarized so: The first part of the hearing concerned Mr. Houthoofd's claim that the prosecution improperly failed to disclose the identity of Officer Eberhardt and the details of his undercover investigation of the solicitation charge. Essentially, Ofc. Eberhardt contacted Mr. Houthoofd in the guise of a hit-man to obtain incriminating evidence in the solicitation case. Mr. Houthoofd did not provide any incriminating evidence and Ofc. Eberhardt closed his file, but this file was never turned over to the defense. Mr. Houthoofd will not summarize this testimony more here because the issue is moot as the Court of Appeals vacated the solicitation conviction that was affected by this evidence.

The relevant testimony from the hearing was the defense attorneys' testimony regarding their reasons for not objecting to the statements in the prosecutor's closing argument. Undersigned counsel asked both attorneys about each statement identified in Mr. Houthoofd's appellate brief. Mr. Piazza testified similarly to most of the statements that he found them

[1] Undersigned counsel has learned from the clerk of the court that no sentencing information report was filed in this case. As will be discussed in the argument section, the scores used by the trial court can be determined by a review of the sentencing transcript.

objectionable, in fact voiced objections to some of the statements, and filed a motion for new trial based on some of the statements identified on appeal. To the extent that he did not offer a contemporaneous objection during the closing argument, it was because he had offered a lot of objections, so many that the trial court at one time told him to sit down, and he did not want to upset the jury with more objections. T 11/21/07 p. 51-52. There were some statements that he did not think were objectionable or were close calls. T 11/21/07 p. 53-60. Mr. Petrick testified that he made numerous objections and, like Mr. Piazza, testified that the trial court eventually told them to sit down, so he decided to forgo some objections. T 1/25/08 pp. 9-10. Otherwise, he testified uniformly that he did not recall whether he found the statements in closing argument objectionable. T 1/25/08 pp. 11-19.

VI. Argument

A. The plain meaning of the venue statute does not permit prosecution in a county where the "effects" of a crime are felt or suffered. Because due process requires prosecution in the proper venue, Saginaw County was an improper venue for the intimidation of a witness charge where the prosecution was based the effects of the alleged crime in Saginaw County.

Standard of Review and Issue Preservation

The question of a trial court's jurisdiction is one of law that this Court reviews *de novo*. *Bruwer v Oaks* (*On Remand*) 218 Mich App 392, 395 (1996), *People v Dickerson*, unpublished per curiam opinion of the Court of Appeals, issued May 12, 1998 (Docket Nos. 187953, 197954) (attached in Exhibit D). This issue also involves the interpretation of a statute, and this Court also reviews statutory interpretation *de novo*. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003). "Due process requires that the trial of criminal prosecutions should be by a jury of the county of the city that the offense was committed, except as otherwise provided by the legislature." *People v Fisher*, 220 Mich App 113, 145; 559 NW2d

318 (1996). For preserved constitutional error, the prosecution must prove that the error was harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18 (1967); *People v Carines*, 460 Mich 750, 764 (1999).

Discussion

The Court of Appeals opinion attempts to reconcile conflicting precedent interpreting MCL 762.8. Unfortunately, the opinion continues an erroneous strain of precedent that is not consistent with the text of 762.8; the case law must be brought in line with the statutory language. The Court of Appeals has recognized this erroneous strain in its precedent but has failed to correct it: As will be discussed in more detail below, *People v Webbs*, 263 Mich App 531 (2004), criticized *People v Fisher* 220 Mich App 133 (1996), and *People v Flaherty,* 165 Mich App 113 (1987), for their erroneous "broad" interpretation of 762.8. The panel in the case at bar perpetuated the error of *Fisher* and *Flaherty*, and Mr. Houthoofd asks this Court to grant leave to resolve this issue.

MCL 762.8 provides that "[w]henever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any one of said acts was committed." The text of the statute is plain and clear that it extends only to acts, not effects. It is undisputed in this case that no actions in furtherance of the intimidation of a witness charge were committed in Saginaw County.

Fisher and *Flaherty* have read 762.8 to permit prosecution in counties where the effects of a crime are felt, irrespective of the location of the acts done in perpetration of the crime. In *Webbs*, the Court of Appeals stated that the holdings of these cases were contrary to the text of Michigan's felony jurisdiction statutes. The *Webbs* court determined that the Grand Traverse County Circuit Court properly dismissed a prosecution for a lack of jurisdiction when none of

the acts done in perpetration of the crime were committed in Grand Traverse County. The court examined the language of MCL 762.8 and concluded that there is nothing in the statute regarding establishing jurisdiction based on the effects of a crime. The court found the language of the statute to be clear and unambiguous, and because courts must enforce statutes as written, the court upheld the decision of the Grand Traverse County Circuit Court.

> "Where. . . venue is established by statute, this Court's primary objective is to effectuate legislative intent without harming the plain wording of the act." *Keuhn v Michigan State Police,* 225 Mich App 152, 153, 570 NW2d 151 (1997). The plain language of MCL 762.8 provides that venue is proper "in any county in which any one of said acts [done in perpetration of a felony] was committed." The Legislature did not draft MCL 762.8 to provide for venue in the county where the "effects" of the acts done in perpetration of a felony were felt. Cf. MCL 762.2(1) (A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or without this state if. . .(e) [t]he criminal offense produces substantial and detrimental *effects* within this state [emphasis added]"). If the language of a statute is clear and unambiguous, this Court must assume that the Legislature intended its plain meaning and enforce that statute as written. Because the plain language of MCL 762.8 requires an act to be done in the perpetration of the felony without regard to where the effects of the crime are felt, and because there was no evidence that any act in perpetration of the crime was done in Grand Traverse County, the trial court properly granted defendant's motion to dismiss on the basis of improper venue.

Id. at 534.

The *Webbs* court criticized *Fisher* and *Flaherty* for interpreting the statute "broadly" and "not comport[ing] with the plain language of MCL 762.8." Despite the conflict in the interpretation of MCL 762.8, the *Webbs* court found *Fisher* and *Flaherty* to be factually distinguishable from the facts in *Webbs*.

The court was correct in *Webbs* that MCL 762.8 has no language that would permit prosecution in a county where the effects of a criminal act are felt or suffered. The panel in the case at bar tried to reconcile *Webbs, Fisher,* and *Flaherty* by reading *Fisher* and *Flaherty* as holding that "when an act done in perpetration of a felony has effects elsewhere that *are essential*

to the offense, venue is proper in the place where the act has its effects." *See* Exhibit A, p. 7 (emphasis added). Mr. Houthoofd, in fact, also advanced this reading of *Fisher* and *Flaherty* as an alternative argument to following the language of 762.8; under this reading, Mr. Houthoofd's solicitation conviction was improper but the intimidation charge was not. However, while this reading has the benefit of refining a more precise rule from the current case law, it comes at the cost of continuing the error of ignoring the language of 762.8.

The panel in *Houthoofd* crafted its effects-based rule from *Fisher* and *Flaherty*. To support its holding, the panel argued that the effects-based rule was consistent with federal authority, but this federal analogy is unhelpful to an interpretation of Michigan statutory law. The panel relied on the erroneous reasoning of two previous Court of Appeals cases and non-binding and, frankly, irrelevant case law from the federal courts to interpret 762.8 contrary to its plain meaning. Because this Court must enforce the clear and unambiguous language of the venue statutes, this Court should vacate Mr. Houthoofd's conviction for intimidation of a witness.

B. The Court of Appeals erred in not ordering a new trial where it vacated one of the Mr. Houthoofd's convictions.

Standard of Review and Issue Preservation

This issue could not be preserved because it only became apparent upon issuance of the Court of Appeals opinion.

Discussion

The Court of Appeals vacated Mr. Houthoofd's solicitation conviction, yet it failed to order a new trial on the remaining charges even though the trial would have been significantly different had the solicitation charge not been presented to the jury. In *People v Basinger*, 203 Mich App 603; 513 NW2d 828 (1994), the defendant was convicted of two counts of CSC II and one count of

CSC I. Defendant moved for a new trial based on the holding in *People v Russo*, 185 Mich App 422; 463 NW2d 138 (1990), which established a dispositive statute of limitations defense for the two CSC II counts. *Russo* had been issued almost a month before the trial began. Apparently based on the fact that the *Russo* case was of such recent vintage, the Court of Appeals declined to find that the defendant's trial attorney was ineffective for failing to file a pretrial motion based on the *Russo* limitations defense.

However, the court did find that Basinger was entitled to relief. Examining the case further, the court found that the evidence of the acts underlying the invalid CSC II charges would have been admissible as other acts evidence in a trial on the CSC I charge. Nevertheless, the court found that because defense counsel did not have an opportunity to request a limiting instruction because of the defense posture at trial, a new trial was required on the CSC I charge:

> In this case, because of the posture of defendant's trial, defense counsel did not have a reason to request a limiting instruction. Assuming, without deciding, that the evidence was admissible under MRE 404(b), we find that the absence of an opportunity to request a limiting instruction denied defendant a fair trial. Hence, the trial court abused its discretion and denied defendant's motion for a new trial. *People v Jehnsen*, 183 Mich App 305, 311; 454 NW2d 250 (1990).

Id. at 606.

Had the trial in Mr. Houthoofd's case been properly handled, at worst the solicitation charge would have been submitted to the jury not as a charge but as other acts evidence. If so admitted, the evidence needed to be for a proper purpose *and accompanied by a limiting instruction*. The failure of a trial court to provide a limiting instruction, when requested, requires reversal. *People v DerMartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973). There was no limiting instruction in this case because the evidence was not treated as other acts evidence, but as evidence of a separate crime. *Basinger* held that a new trial is required when evidence is

improperly submitted as a separate charge. In cases in which the appellate courts do not grant relief based on the failure of the trial attorney to request a limiting instruction, invariably *the evidence was submitted as other acts evidence.* The distinction in this case and in *Basinger* is that the evidence was submitted to prove another charged crime, not as other acts evidence. *Basinger* held that in such a situation, the lack of a limiting instruction violates a defendant's right to a fair trial.

The Court of Appeals should have remanded for a new trial, even if it did not grant relief on any other issue.

C. The trial court erred and violated Mr. Houthoofd's due process right to a fair trial by permitting the prosecution to introduce the kitchen sink material on the theory that Detective VanHorn's knowledge of these acts caused him to feel threatened or intimidated.

Standard of Review and Issue Preservation

This issue was preserved by pretrial motion and innumerable objections pretrial and during trial.

Normally, this Court reviews the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But because the trial court relied on its interpretation of the intimidation of a witness statute to admit the 404(b) evidence, this Court reviews the trial court's interpretation of a statute *de novo*. *Bruwer v Oaks* (on remand) 218 Mich App 392, 395 (1996), *People v Dickerson*, unpublished per curiam opinion of the Court of Appeals, issued May 12, 1998 (Docket No. 187953, 197954) (attached in Exhibit D).

In addition, as will be discussed below, because the other acts evidence in this case was so pervasive and so prejudicial, and because both the prosecutor and the trial court stated that it was not necessary for the prosecutor to prove that Mr. Houthoofd committed any of the acts, the

admission of this evidence violated Mr. Houthoofd's due process right to a fair trial. *Cooper v Sowders,* 837 F2d 284 (CA 6 1988). For this preserved constitutional error, the prosecutor must establish that the error was harmless beyond a reasonable doubt. *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999).

Discussion

Mr. Houthoofd's was an uncommon trial. Insinuations and obloquies were spread on the record – from VanHorn's testimony about hearsay statements from third parties regarding their opinions and fears of Houthoofd, to suggestions that Mr. Houthoofd had attacked and bombed a supervisor at GM years after Mr. Houthoofd left Toledo (despite the fact that Mr. Houthoofd had never even been *interviewed* regarding this attack). What was most remarkable was that this evidence was introduced under the express theory that the prosecution had no duty to prove that Mr. Houthoofd actually committed these acts or was in any way responsible for the hearsay opinions of the third parties. It is truly an amazing theory of law that permits a witness to testify regarding every allegation and rumor about the defendant that he is aware of. The prosecution claimed that MRE 404(b) did not control the introduction of this evidence (and the Court of Appeals agreed (*see* opinion, p. 12)) because it was admitted to explain what Detective VanHorn was thinking. [2] Contrary to the Court of Appeals statement, the evidence was not admitted "only . . . to establish what information Detective VanHorn had collected during his investigation of defendant, and that defendant knew the detective possessed that information." See Opinion, p.

[2]Some of the evidence does not fall under character or other acts evidence. The most notable example is the reading material introduced against Mr. Houthoofd. While the discussion in this section is framed under MRE 404(b), the arguments are equally applicable to the reading material because Mr. Houthoofd's main arguments are that the evidence was irrelevant and more prejudicial than probative. All evidence must meet these requirements, so the arguments regarding the alleged other acts and reading material are essentially the same.

13. Because the evidence was irrelevant to the charge of intimidation, the only purpose and effect of its introduction was an improper character inference. While the prosecutor did explain its "VanHorn's knowledge" theory to the jury. a perusal of the trial and closing arguments shows that the prosecution argued expressly and implicitly that Mr. Houthoofd had actually committed the acts and was actually a dangerous person – not merely that Detective VanHorn thought this of Mr. Houthoofd. The prosecution's claims to the contrary were disingenuous.

The prosecution claimed that it did not have to prove that Houthoofd committed any of the kitchen sink acts.

Prior to admission of other acts evidence, the prosecutor must meet a foundational requirement by proving by a preponderance of evidence that the defendant participated in the other acts in question. *People v Dumas,* unpublished opinion per curiam of the Court of Appeals, issued June 16, 2000 (Docket No. 208829) (citing *People v Crawford,* 458 Mich 376, 383-85; 582 NW2d 785 (1998)) (attached in Exhibit D).

The prosecution argued both to the jury and the trial court that it was not required to prove that Houthoofd committed any of the acts in the kitchen sink material. T 2/10 38. The trial court agreed, stating on the record a number of times that the prosecution did not have to prove that Houthoofd committed these acts. *See, e.g.,* T 7/21/05 36. Because of the trial court's opinion on this point, it failed to fulfill its duty to make findings of fact under 404(b).

In fact, the trial court expressly allowed into evidence anything in VanHorn's mind that allegedly scared him about Houthoofd, whether or not there was any basis in reality or any link to Houthoofd. This ruling goes beyond MRE 404(b). The kitchen sink material – consisting of whatever bad thoughts VanHorn had about Houthoofd – violated Houthoofd's due process right to a fair trial. It is axiomatic under our constitutional system of criminal justice that fault is

individual. *Delgado v United States*, 327 F2d 641, 642 (CA 9 1964); *People v Sobczak*, 344 Mich 465, 469-470 (1955). It is not constitutional to hold a defendant responsible for another's acts (or in this case the thoughts of another (VanHorn)).

The kitchen sink material was irrelevant to the intimidation charge

Other acts evidence admitted under MRE 404(b) must be relevant under MRE 401 and 402. *People v Crawford,* 458 Mich 376, 385; 582 NW2d 785 (1998). The prosecution's theory of admission was that the kitchen sink material was relevant to prove Det. VanHorn's understanding of the threatening telephone call as a threat. One of the foundational problems of this theory is that the intimidation of a witness statute does not require that the witness subjectively understand the statement as a threat or feel fear as a result of the threat. *See* Exhibit B, MCL 750.122 excerpt.

The text of the statute says nothing about the subjective understanding of the witness or the subjective feelings of the witness. The legislature is perfectly capable of inserting language regarding the victim's subjective fear into statutes. For instance, MCL 400.1501 defines "domestic violence" as "[p]lacing a family or household member in fear of physical or mental harm." In MCL 750.411s (regarding posting of threatening messages on a computer) the legislature defined "credible threat" as:

> a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual.

MCL 750.411s(8)(e). The carjacking statute distinguishes between threats and putting in fear:

> A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence or who puts in fear an operator, passenger, or person in lawful possession of the motor vehicle . . .

MCL 750.529a(1). In the bank robbery statute, the legislature established two separate elements:

threatening to confine, kill, maim, injure or wound; or (2) putting in fear any person for the purpose of stealing from a bank. MCL 750.531. In the unarmed robbery statute, the legislature used the specific phrase "puts the person in fear" as an element of the crime. MCL 750.530. The fact that the intimidation statute does not have a subjective element to it renders the kitchen sink material irrelevant.

The material is also irrelevant because it could not assist VanHorn in interpreting the meaning of "I want to let you know I saw you in court last week, and I want to let you know that I know where you live motherfucker." This statement is not ambiguous. To the extent that VanHorn needed to interpret this statement, the kitchen sink material would not assist him. There was no testimony that this was a phrase that Houthoofd had previously used so that VanHorn would know what he meant by it. As the prosecutor stated in closing argument:

> If the defendant had called up Detective Sergeant VanHorn and said, something's going to happen to you that happened to Tom, Dick and Harry, what does that mean if you don't know what happened to Tom, Dick and Harry? And what happened to Tom, Dick and Harry didn't have to be done by the defendant. It could have been done by anybody.
>
> But if Tom got his head caved in in bed sleeping at his home and Dick had a pipe bomb go off on his porch and blow it away, and Harry had a shotgun blast come through his window and hit his spouse, now you understand why that background information is there and why you couldn't do your job as jurors unless you knew it.

T 2/10 38. *But the caller did not say that what happened to Tom, Dick, and Harry was going to happen to VanHorn.* VanHorn's belief that Houthoofd was involved in violent activities could do nothing to help him to understand the actual words spoken in the threatening phone call.

To make this point more clear, assume that the caller had stated to VanHorn, "The Tigers are doing very well this year." VanHorn's understanding of Houthoofd as a violent man could do nothing to turn those words into a threat. The reason that this case was charged is because the

words themselves are obviously and plainly a threat. Unless Houthoofd was speaking in a code that needed deciphering, the kitchen sink material is irrelevant. Even if it was a code, the relevant evidence would be facts that would decipher the code, not simply characterize Mr. Houthoofd as dangerous and violent. The call was interpreted as a threat because of the words used, not because of Houthoofd's alleged background.

In the Court of Appeals, the prosecution gave the lie to its own argument that the kitchen sink evidence was necessary to interpret the phrase when it wrote, "The record shows that Appellant on one occasion during a break in the first tractor trial expressed anger *with expletives* to VanHorn, but VanHorn concluded from the circumstances that there was no such element of threat on this occasion." Prosecution's Brief pp. 46-47 (emphasis in original). Why? Why was there no such "element of threat on this occasion"? If Det. VanHorn knew about all the alleged bad acts of Mr. Houthoofd, and Mr. Houthoofd knew that he knew, then presumably the statement on this occasion would have brought up all the same information in Det. VanHorn's mind. *Unless the difference was in the words spoken and the tone of the speech.* In other words, the reason that Det. VanHorn thought the phone call was a threat was *not* because of the other allegations against Mr. Houthoofd, but because of the circumstances of the statement: the words used, the locale, the tone, etc. For instance, the prosecution expressly stated that the reason that the second phone call was not interpreted as a threat was because of the "*tone*." Prosecution's Brief p. 47 (emphasis in original).

Despite these concessions, the prosecution also stated that "I know where you live, motherfucker" needs translation because "[i]n today's culture, with our coarsened social dialogue, even good friends might easily say the above words innocuously to each other without any intent to intimidate or terrorize." Prosecution's Brief p. 46. Except that no one is contending that Mr.

Houthoofd and Det. VanHorn were bosom friends. To whatever extent the coarseness of society allows the younger set to casually greet each other with, "I know where you live, motherfucker," it is not evident that an anonymous telephone call to a Michigan State Police Detective using these same words follow the same conventions. It is also important to remember that the allegation is that the caller prefaced this statement with the statement, "I saw you in court last week." An anonymous phone call that consists of the statement "I want to let you know I saw you in court last week, and I want to let you know that I know where you live motherfucker" (T 1/19 10-11) cannot be interpreted as something "even good friends might easily say the above words innocuously to each other."

The evidence was not relevant to understanding the plain meaning of the words.

The evidence was more prejudicial than probative.

According to this Court, in order to admit prior bad act evidence against a defendant at trial, the probative value of the evidence must not be substantially outweighed by unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

The primary danger of prior misconduct evidence is that it tends to be overvalued by the jury, denying the accused a fair opportunity to defend against the charged crime. *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988). Violations of court rules such as MRE 404(b) can violate a defendant's due process right to a fair trial. *Cooper v Sowders*, 837 F2d 284 (CA 6 1988).

One of the most prejudicial aspects of the kitchen sink material was that it consisted of whatever VanHorn had in his mind, whether it was fact, rumor, supposition, or mere accusation. VanHorn offered third-party hearsay regarding how crafty and scary Mr. Houthoofd was. The prosecution introduced evidence that Mr. Houthoofd's former boss in Toledo was attacked and, three years after Mr. Houthoofd left Toledo, a bomb went off in the boss's home. Yet there was

no testimony tying Mr. Houthoofd to this crime and Mr. Houthoofd was never interviewed for it, let alone charged. The true issue in the intimidation of a witness charge was identity -- whether Mr. Houthoofd was the person who made the call. All of the rest of the evidence was highly prejudicial propensity evidence and should not have been admitted.

The Court of Appeals stated that it "was inclined to agree with defendant that at least some of the 'kitchen sink material' was unfairly prejudicial" but declined to find it unfairly prejudicial as a whole. The prosecution conceded, implicitly, that it introduced the kitchen sink material for an improper character purpose. In its brief to the Court of Appeals, the prosecution argued, in part, that Mr. Houthoofd's successful background was the reason that it introduced the kitchen sink material. The prosecution was concerned that Mr. Houthoofd "could present himself as a person who had everything going for him – his children, a great job, a beautiful home, a license to fly planes, and plenty of material possessions." Prosecution's Brief p. 44. The prosecution continued: "In the above circumstances, it could easily seem alien to the jury that he might choose to do something so selfish as the tractor fraud, and then coolly compound that crime with an act as profoundly evil in potential consequences as the solicitation to murder Wurtzel, and then believe himself so unreachable that he could stop the due process of law by engaging in a frightening act of intimidation against VanHorn and his family." Prosecution's Brief p. 44-45. But if the jury would be confused by Mr. Houthoofd acting in the manner alleged because of his solid and happy personal life, introduction of the kitchen sink material would be useful precisely to dispel in the jurors' minds their concerns that the alleged crimes did not comport with Mr. Houthoofd's good life and character. In other words, the evidence was submitted to prove that, despite Mr. Houthoofd's suburban bourgeoisie lifestyle, he is the type of person who would commit these crimes. It was evidence to prove bad character and propensity, it was not evidence to prove the

meaning of the statement in the phone call.

The Court of Appeals concluded that, even if it were to find that the evidence were inadmissible, admission was not prejudicial (although it was a "close call") because the evidence against Mr. Houthoofd was "overwhelming." The court wrote:

> In regard to the false pretenses charge, the prosecution presented evidence that a man identifying himself as Colin Francis, and using Francis's driver's license, rented a tractor and tiller from Wurtzel's store, but never returned the equipment. Francis was a co-worker of defendant's who had recently lost his driver's license. Years later, investigators found a tractor and tiller on defendant's property, and driver's licenses bearing the names "Colin Francis" and "Dale White" in defendant's truck. Wurtzel subsequently identified the tractor and tiller, and picked defendant out of a lineup as the man who had rented the equipment.

Exhibit A, p. 14. First, Wurtzel's identification was not strong: he identified Houthoofd as the one who looked most like the man, but he was not positive. T 1/26 pm 44-45. Wurtzel's original description of the renter did not match Mr. Houthoofd. T 1/26 pm 39-41. Wurtzel's description of the renter's truck did not match Mr. Houthoofd's truck. T 1/26 pm 43-44. Second, while Mr. Houthoofd was in possession of a tractor and the driver's license, he innocently purchased the tractor from a third party; even Lt. Yancer had seen a copy of the receipt. T 1/27 33-74. The VIN number of the tractor that Wurtzel reported as stolen matched the VIN number of a tractor that he sold on March 10, 1998, to Michael Wheeler – it did not match the tractor in Mr. Houthoofd's possession. T 1/26 pm 50-54.

As the court notes in the next excerpt, Mr. Houthoofd's first trial ended in a hung jury, demonstrating the weakness of the case.

> Although all of this evidence was admitted at the first tractor trial, and that trial ended in a hung jury, the prosecution presented additional incriminating evidence at the consolidated trial. Defendant claimed to have purchased the tractor and tiller in 1999 from Denny VanHaaren at Delta College, where Denny was a bricklayer, and to have found the driver's licenses in the tractor. But, at the consolidated trial, Donald VanHaaren testified that his son Denny had not been in Michigan since

> 1994, and that the handwriting on the purchase receipt defendant presented was not Denny's handwriting. Guy Periard, who was familiar with all of the bricklayers who worked at Delta College in 1999, testified that no person named Denny VanHaaren had ever worked there. White testified that he recognized defendant from flight instruction trainings they had both attended and that at one of those trainings, he lost his driver's license.

Exhibit A, pp. 14-15. First, the evidence regarding Denny VanHaaren is not incriminating, contrary to the court's characterization. As Mr. Houthoofd has explained, he purchased the tractor at a Delta College sale; if the tractor were stolen property, it would be *expected* that the seller would use a false identity. The fact that there is evidence that Denny VanHaaren could not have been the true seller corroborates rather than undermines Mr. Houthoofd's version. Second, as to Dale White, Mr. White could not identify Mr. Houthoofd as the person who stole his driver's license; in fact, he didn't know that it was stolen, only that it was missing. T 1/25/06 am 9-20. Mr. White's license had no direct relevance to the tractor case because it involved a different incident and different people.

> Additionally, evidence that defendant solicited Dotson to murder Wurtzel before the first tractor trial, and then threatened Detective VanHorn before the retrial, demonstrated consciousness of guilt. Considering all of this evidence, defendant cannot establish that, but for the admission of the "kitchen sink material," the jury would not have found him guilty of obtaining property by false pretenses.

Exhibit A, p. 15. Mr. Houthoofd denies that he solicited murder or threatened Det. VanHorn. While the common-law recognizes that consciousness of guilt evidence may be admissible, it must be handled gingerly to avoid its powerfully prejudicial effect. It is useful for the prosecution because it is prejudicial, not because it is logically strong evidence. On the contrary, the law fully recognizes that this evidence is at least as consistent with innocence as it is with guilt.

> Doubtless the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principle from which consistency springs; but it does not follow, because the moral courage and consistency which

> generally accompany the consciousness of uprightness raise a presumption of innocence, that the converse is always true. Men are differently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt, and every man is therefore entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty.

Hickory v United States, 160 US 408, 16 S Ct 327, 418, 40 L Ed 474 (1896).

The bottom-line is that the first trial ended in a hung jury, the second trial did not add significantly to the evidence against Mr. Houthoofd, and the jurors were, *as a matter of record*, fearful of Mr. Houthoofd (see discussion regarding prosecutorial misconduct below). The kitchen sink material was outcome-determinative.

> In regard to the intimidation charge, the prosecution presented evidence that eight days before the tractor case retrial was scheduled to commence, Detective VanHorn received a page from a phone number he did not recognize. Phone records established that the cell phone used to call the detective's pager belonged to Rinness, but Rinness testified that she had lost the phone. The same cell phone was used to call several phone numbers associated with defendant and his girlfriend.

Exhibit A, p. 15. Rinnes did not testify that Mr. Houthoofd stole her phone. The only testimony she offered was that she lost her phone, at the Fraternal Order of Police hall or, possibly, at a local bar. 2/1/06 T 179-80. The court fails to note that the calls made to "phone numbers associated with defendant and his girlfriend" were very short. The length of the calls suggest that they were not legitimate phone calls, and this fact is consistent with a third-party culpability theory that someone else made the threatening call but also made incriminating calls to numbers associated with Houthoofd.

> Detective VanHorn testified that when he returned the page, a person who sounded exactly like defendant said, "I want to let you know I saw you in court last week, and I want to let you know that I know where you live, motherfucker."

Exhibit A, p. 15. Det. VanHorn initially did not identify Mr. Houthoofd at all as the caller; he

identified the voice only as male. T 2/8 150. It was only later that Det. VanHorn became certain of the identity of the caller.

> According to the detective, when he heard defendant say those words, he believed that defendant "was letting [him] know that there was no doubt that he was going to kill [him], attempt to kill [him], or harm [his] family," and that "it was just a matter of time."The phrase, "I want to let you know that I know where you live, motherfucker," coming from defendant to the detective-one of the key witnesses in the tractor case-immediately before the tractor case retrial, could reasonably be construed as a threat of violence or property damage. Even absent the "kitchen sink material," those words strongly indicated defendant's intention to find the detective or his family at the place where they lived, and kill or injure them or damage their property, if the detective testified at the retrial. We are not persuaded that, but for the admission of the "kitchen sink material," the outcome of the intimidation case would have been different.

Exhibit A, p. 15. The prosecution does not agree with the court that the evidence was overwhelming. At oral argument in the Court of Appeals, on questioning by Judge Beckering, the prosecution stated three times that it did not believe that the evidence was sufficient for a conviction without the kitchen sink material. COA Oral Argument, pp. 39-40.[3] The prosecution and defense agree: the case was technically valid (in the sense that the allegations, if true, could constitute a crime under Michigan law), but substantively weak. It was the kitchen sink material that made the prosecution's case.

Mr. Houthoofd prays that this Court reverse and remand for a new trial.

D. There was insufficient evidence to convict defendant of false pretenses over $100 where the crime requires that the victim intend to pass title as well as possession, and the victim in this case did not intend to pass title because he was operating a rental equipment store.

Standard of Review and Issue Preservation

The standard of review is de novo. *People v Wolfe*, 440 Mich 508 (1992). This issue was

[3] Following oral argument, the Court of Appeals granted Mr. Houthoofd's motion to make a transcript of the oral argument. Mr. Houthoofd has served a copy of that transcript on the prosecution.

preserved by a pretrial motion. *See* motion dated February 4, 2005. Sufficiency of the evidence is reviewed *de novo. United States v. Canan,* 48 F3d 954, 962 (CA 6 1995). "The sufficient evidence requirement is a part of every criminal defendant's due process rights." *People v Wolfe*, 441 Mich 501, 514, 489 NW2d 748, 751 (1992); US Const, Am V; Const 1963 art 1, § 17. "When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt." *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999). Preservation of this issue is not required. *People v Patterson*, 428 Mich 502, 514 (1987).

Discussion

There was insufficient evidence to convict Mr. Houthoofd of obtaining property by false pretenses because under Michigan law the victim in a false pretenses case must intend to convey both possession *and* title. Because Wurtzel was operating a rental equipment store, he did not intend to convey title to the tractor and rototiller. Therefore, the false pretenses charge was improper and there was insufficient evidence to convict Houthoofd.

The false pretenses statute is MCL 750.218. *See* Exhibit C. If an owner is induced to part with both possession and right of ownership by the fraudulent representations of someone who receives the property with felonious intent, the proper charge is false pretenses, *People v Christensen*, 412 Mich 81, 312 NW2d 618 (1981). The crime of larceny is distinguished from the crime of obtaining property by false pretenses in that in larceny only the possession of property is transferred to the offender, while in false pretenses both possession and ownership are transferred intentionally to the offender. *People v Jones*, 143 Mich App 775, 372 NW2d 657 (1985).

In *People v Martin*, 116 Mich 446, 74 NW 653 (1898), cited in *People v Long*, 409 Mich

346, 294 NW2d 197 (1980), this Court identified the distinction between larceny and false pretenses:

> There is, to be sure, a narrow margin between a case of larceny and one where the property has been obtained by false pretenses. The distinction is a very nice one, but still very important. The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offense. In the former case, where, by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established; while in the latter, where title, as well as possession, is absolutely parted with, the crime is false pretenses. It will be observed that the intention of the owner to part with his property is the gist and essence of the offense of larceny, and the vital point upon which the crime hinges and is to be determined.

116 Mich 450-451 (quoting *Loomis v People,* 67 NY 322, 329; 23 Am Rep 123 (1876)).

The legislature has provided for a special larceny statute detailing the crime of failing to return rental property with the intent to defraud: MCL 750.362a. The prosecutor is not obliged to charge any particular crime if two different crimes apply, but in this case, the false pretenses charge *does not* apply because Wurtzel did not intend to convey title. The prosecutor in this case did not charge the proper crime, the evidence was insufficient to convict Mr. Houthoofd, and Mr. Houthoofd prays that this Court vacate and dismiss.

The prosecution argues that the false pretenses statute has been modified to render the case law in Mr. Houthoofd's brief obsolete. The main problem with the prosecution's argument is that the case law continues supports the distinction identified in Mr. Houthoofd's opening brief and not the prosecution's interpretation. In addition to the cases cited above, *People v Malach*, 202 Mich App 266 (1993), reiterates the same distinction that Michigan courts have recognized for decades:

> The distinction between the two offenses therefore depends entirely upon the intent of the victim: if the owner of the goods intends to keep title but part with possession, the crime is larceny; if the owner intends to part with both title and possession, albeit for the wrong reasons, the crime is false pretenses. *Long, supra* at 350-351, 294 N.W.2d 197 (relying on *Martin, supra* at 450-451, 74 N.W. 653); see also *People v. Jones,* 143 Mich. App. 775, 780, 372 N.W.2d 657 (1985). In

Long, supra at 351-352, 294 N.W.2d 197, for example, the defendant tricked a cashier into voluntarily giving him more change than he was entitled to; the offense was obtaining money under false pretenses. In *Jones, supra* at 776-777, 780, 372 N.W.2d 657, on the other hand, the defendant took money took the money without her consent.

Id. at 271. *See also In re Newpower*, 233 F3d 922 (CA6 2000) (citing *Malach*).

Mr. Houthoofd is entitled to have this conviction and sentence vacated.

E. The prosecutor committed prosecutorial misconduct and deprived Mr. Houthoofd of his due process right to a fair trial in closing argument.

Standard of Review and Issue Preservation

Some of these issues are preserved and some are unpreserved. The issue regarding the threats to the jurors' personal safety was preserved by a motion for new trial. Two of the prosecutor's statements identified in the second half of this section were objected to; the others were not. For those issues that this Court finds were unpreserved, Mr. Houthoofd has raised a claim of ineffective assistance of counsel in the following section.

Discussion

A prosecutor may only comment on the facts in evidence and on the reasonable inferences that can be drawn from those facts. *People v Sharbnow,* 174 Mich App 94, 100-101; 435 NW2d 772 (1989); *People v Bairefoot,* 117 Mich App 225; 323 NW2d 302 (1982).

It is improper for the prosecutor to disparage the accused. *Oregon v Kennedy*, 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982). It is also improper to disparage defense counsel. *People v Hunt,* 68 Mich App 145, 148 (1975).

When reviewing a claim of prosecutorial misconduct, courts consider the following:

1. the degree to which the remarks complained of have a tendency to mislead the jury and prejudice the accused;
2. whether the remarks are isolated or extensive;
3. whether the remarks are deliberate or accidentally placed before the jury; and

4. the strength of the proofs introduced to establish the guilt of the accused.

See United States v Payne, 2 F3d 706, 711-712 (CA6 1993); *United States v Leon*, 534 F2d 667, 679 (CA6 1976).

Threats to the jurors' personal safety

During closing and rebuttal arguments, the prosecutor made two direct references to threats to the jurors' personal safety from Mr. Houthoofd and their fear of Mr. Houthoofd:

> Mr. Piazza sort of made light of it when Detective Sergeant VanHorn was on the stand. I'd like to have that, "297 Secrets the Law and Lawyers Don't Want You to Know." Perhaps Mr. Piazza should have read it, and he could have been aware of what I had Detective Sergeant VanHorn read. And I'll only reread one sentence that was chilling. It is page 115. "It is never enough to argue the facts to a jury, whether the jury is composed of 1 or 12. What you must point out to them is that their ultimate decision, if not in your favor, will cause pain to them." I've never read anything like that before.

T 2/10/06 p 70 l 4-15.

> And if you vote like the evidence shows that he's guilty and you're going to be telling him that, you're not going to be able to hide behind your foreperson, whoever it is that's elected to manage the jury deliberations. You are going to have to individually say, when asked by the judge -- because it will be asked of you, I assure you. One side or the other will say to you, I want the jury polled. And your foreperson will sit down and the 12 of you will say that was my verdict. You'll have to say that, I find you guilty as charged, Mr. Houthoofd. Based on the evidence you've heard, that might trouble you. Please don't let it trouble you. Your fear of him, if you have it, has nothing to do with deliberations and deciding this case.

T 2/10/06 p 229 l 14-18.

The jurors' fear of Mr. Houthoofd became a matter of record in the trial court's opinion and order following conviction dated February 28, 2006:

> Following its usual custom, the Court, after the verdicts were returned, met with the jurors off-the-record and spoke with them. At least two jurors expressed concerns for their personal safety, based upon fears of retribution from the Defendant or a person or persons acting in his behalf. Other jurors expressed concerns about walking from the Courthouse to their vehicles on that final day of their jury service.

See Order and Opinion dated February 28, 2006.

It is not speculation that the jurors would be influenced by the prosecutor's stoking of jurors' fears for their own personal safety; because of Judge Heathscott's order, it is part of the record that the jurors were afraid for their lives. There are many important safeguards in a criminal trial to protect the integrity of the proceedings, and not least of these is a disinterested jury. That safeguard failed in this case due to the prosecutor's actions. The Court of Appeals found that the prosecutor's comments were not misconduct in part because the logical implication of the prosecutor's statements was that the jury would be harmed if it found Mr. Houthoofd guilty, not if it found him innocent, so that there was no prejudice to Mr. Houthoofd:

> We note, however, that in all of those cases, the prosecutor's remarks strongly suggested that acquitting the defendant or finding the defendant guilty of a lesser charge would expose the jurors or their loved ones to attack. In this case, the prosecutor urged the jurors to find defendant guilty based on the evidence presented at trial, whether they feared him or not. The prosecutor's remarks were proper.

Exhibit A, p. 20. This reasoning ignores two facts: First, Mr. Houthoofd was charged with three crimes, of varying severity. It is entirely possible that the jury could have been convinced of Mr. Houthoofd's guilt of the false pretenses charge but not the more serious intimidation or solicitation charges. But, out of the fear nurtured by the prosecutor, decided to convict him of the more serious charges as well to insure that he be incarcerated longer, thereby reducing the risk of harm to them. Second, the law forbids appeals to juror fear because the law desires jurors to make decisions free from emotional and prejudicial influences for the very reason that emotion and prejudice do not follow logic and the facts. Introduction of raw emotional fear of the defendant interrupts the reasoned deliberative process that the law desires from jurors. The Court of Appeals' speculation about what logically follows from the prosecutor's improper arguments

ignores the fact that juror fear disrupts logical thought entirely.

Also contrary to the Court of Appeals opinion, it was not simple "fair response" that the prosecutor cited the section of the reading material that he did. There were multiple exhibits to choose from - entire books with innumerable quotes he could have chosen. Instead, he specifically chose an excerpt regarding threats to a jury. It was no slip of the tongue either (even if reading an excerpt could be characterized as such) because one of the last things that the jury heard before going to deliberate was that they would have to stand and be polled in front of Houthoofd and that they might be afraid to do that.

If the prosecution thought that the jury was in jeopardy, it could have requested an anonymous jury. *People v Williams,* 241 Mich App 519; 616 NW2d 710 (2000). The court's February 28th order in fact renders the jury anonymous but only after the fact - just in time to allow the jurors to deliberate in fear for their own lives, but not in time to allow Mr. Houthoofd the right to an impartial jury. Instead of taking this route, the prosecutor dumped everything, including the kitchen sink, into the record and then told the jurors that they should fear Defendant. This was grossly improper and deprived Mr. Houthoofd of his due process right to a fair trial.

The ABA Standards for Criminal Justice state that a "prosecutor should not make arguments calculated to appeal to the prejudices of the jury . . . and should refrain from argument which would divert the jury from its duty to decide the case on the evidence." *The ABA Standards for Criminal Justice, The Prosecution Function* § 5.8(c) and (d).

In *People v Leverette*, 112 Mich App 142; 315 NW2d 876 (1982), the court found prosecutorial argument to be improper in part because the prosecutor "argued from the hypothetical case putting the jurors in the position of the victim." *Id.* at 151. While Michigan case law holds consistently with other states that appeals to the prejudices and passions of the jury

are improper, Appellant has been unable to locate any Michigan case relating directly to warnings to the jury regarding the danger to their own personal safety from the defendant. However, other courts across the country have faced such situations and have roundly condemned the practice. "Instincts of self-preservation cannot serve as a surrogate for detached evaluation of guilt or innocence." *State v Pineau*, 463 A2d 779, 781 (ME Sup Ct 1983).

In *People v Blackman*, 44 Ill App 3d 137; 358 NE 2d 50 (1976), the Illinois Court of Appeals held that it was improper for the prosecutor to warn the jurors that if they voted to acquit the defendants, they had better "beat defendants back to their cars."

In *State v Jones*, 266 Minn 523; 124 NW2d 727 (1963), the defendant was on trial for rape and during closing argument, the prosecutor stated that it had a duty to prosecute that type of crime because "[I]t could be my daughter, it could be your daughter, it could be anybody's daughter, it could be my wife, it could be anyone else's wife." *Id.* at 523; 1224 NW2d at 727-28. He repeated similar comments two additional times. *Id.* Despite objection and a curative instruction, the Minnesota Supreme Court reversed stating, "The clear implication of the argument given by the county attorney was that acquittal of defendant would expose those most loved by the jurors to possible rape."

In *Grant v State*, 194 So 2d (Fla 1967), the Florida Supreme Court held that even absent an objection, it was highly prejudicial and reversible error for the prosecutor in closing argument in a murder prosecution to state, "Do you want to give this man less than first-degree murder in the electric chair and have him get out and come back and kill someone else, maybe you?" *Id.* at 613.

In *Johnson v State*, 453 NE2d 365 (Ind App 1983), the court stated that it was misconduct for the prosecutor to "phrase final argument in a manner calculated to inflame the passions or the

prejudices of the jury[.]" *Id.* at 369. It held further that it was improper for the prosecutor to "stress [] the jurors' right to be safe in their own homes and asking one juror if he wanted his wife to be raped[.]" *Id.* It was not proper for the prosecutor to appeal to the jurors' fears, thereby prompting them to convict the defendant "not because he was guilty, but because he was dangerous." *Id.*

In *Cleveland v Egeland*, 26 Ohio App3d 83; 497 NE2d 1383 (1986), the defendants were convicted of aggravated disorderly conduct for lying in the middle of the road as part of a protest against nuclear war. *Id* at 84-86. In his closing, the prosecutor told the jurors that if they decided to find the defendants not guilty, that the next morning if they got into their cars and started backing down their driveways and someone was lying in their driveway as a protest against nuclear war, there would be nothing that they could do about it. *Id.* at 87-88; 496 NE2d 1083-89. While the Ohio court concluded that the remarks were harmless error and responsive to defendant's argument, it stated the general rule that a prosecutor "cannot properly threaten the juror that an acquittal would jeopardize them personally." *Id.* at 838; 497 NE2d 1389. "Such arguments ask the jurors to shed their objectivities and to assume the role of interested parties." *Id.*

In *People v Ferguson,* 191 AD2d 809, 594 NYS 2d 860 (NY App 1993), in a prosecution for second-degree murder, the prosecutor stated in closing argument that if the jury found the defendant not guilty by reason of mental disease or defect that the defendant might be out of jail in a few months, and the prosecutor asked the jurors "to contemplate whether they would be able to 'sleep safe and secure' knowing this." *Id.* at 810; 594 NYS 2d at 862. Even though the trial court did give a curative instruction, the court still reversed, holding that it was "unlikely that the jury

would have put out of its collective mind the fear and apprehension intended by the prosecutor's statement." *Id.* at 811; 594 NYS 2d at 862.

In *State v Hoppe*, 641 NW2d 315 (Minn App 2002), the court reversed in a prosecution for drunk driving where the prosecutor referenced the fact that the defendant had been convicted multiple times of drunk driving and that "our loved ones are out there and we don't want something bad happening." *Id.* at 320. The court reversed in part based on this comment because it "distract[ed] the jury from its duty of determining whether the state met its burden of proof beyond a reasonable doubt." *Id.*

Disparaging defense counsel and the Defendant

In the following statement, the prosecutor diverges from his theory that the kitchen sink material only purpose was to prove VanHorn's state of mind and uses it to argue the substance of Houthoofd's character – that he is selfish and uses people as pawns. Note that he in fact personalizes the statement to include the jury stating that "*we* are pawns." (Emphasis added).

> But from the point of view of one person in this courtroom, and I think you know who I'm talking about, he has moved us around on the board. He has chosen a strategy of dealing with individuals with whom he's come in contact and a way to live his professional life at GM and sometimes the way he handles dealing with other people whose property he wants or something he wants from them in his selfishness that we are pawns.

T 2/10/06 p 5 l 23-p 6 l 3.

Here, the prosecutor calls Mr. Houthoofd a "selfish coward."

> Well, the reason all that's necessary, welcome to the world of Tod Houthoofd. In his world, Mr. Houthoofd can take whatever he wants, he can do what he feels like doing, and he can harass or hurt whoever tries to stop him. I don't like to call people names. I was called names. The detectives were called names. But I'm going to say what I believe the evidence in this case has shown with respect to Mr. Houthoofd on the three charges made against him. He is a selfish coward who uses people as it suits him, who prefers to blindside his opponents, and will get even no matter how long it takes.

T 2/10/06 p11 l 18- p 12 l 5.

The prosecutor did not restrict his comments to defendant, but also commented on defense counsel. In the following quote the prosecutor undermined the position of defense counsel and Mr. Houthoofd's defense by insinuating that Mr. Houthoofd's attorneys privately believed that Mr. Houthoofd was guilty. After an objection, the prosecutor back-tracked, but given the extensive nature of his other comments, this insinuation was not a mistake and was not harmless.

> What is necessary for a jury, however, to decide a case based on, what justice and law to mean, is that verdicts be based only on evidence and not the arguments of lawyers who themselves are not witnesses; because the system requires him to take a side and him to take a side. Mr. Petrick and Mr. Piazza don't have a choice. They are hired by the defendant to represent his interest, to argue his side. They have to seek a verdict of not guilty from you even if privately they think the evidence shows beyond a reasonable doubt that he's guilty –

T 2/10/06 p 13 l 25- p14 l 10. (There was an objection).

The prosecutor makes a pretense of an even-handed argument, but repeatedly insinuates that the defense has some burden in the case.

> As a matter of fact, the People have the burden of proving whatever they charge. The defendant has no burden to prove anything. But that doesn't mean they can't try. It doesn't mean they can't engage in a trial and have it be a clash. And even though the defense called one witness that doesn't matter, because the Court will tell you it doesn't matter how many witnesses testified for either side. It's all the evidence, whoever offered it. And most of the defense case, if there is a case here, came in through the People's witnesses; because we are not hiding the fact that there's some nonsuccess along the way.

T 2/10/06 p 51 l 24- p 52 l 10.

In the next quote, the prosecutor denigrates defense counsel's strategy, implying that defense counsel was engaged in a plot of nefarious legal trickery to keep relevant evidence from reaching the jury.

> Now, the defense has no duty to agree, to stipulate, to not object to anything. It's

> their duty, as a matter of fact, as advocates of the defendant to fight if certain evidence wants -- we want to put in they don't like, they can object to it. They can stipulate to things. You've heard stipulations in the course of this trial. We will stipulate to that. One of those, I think, happened when I moved the admission of the John Deere records. No, we object to that. We'll let ours in, but we don't want yours. And then I brought the John Deere guys in. Well, we don't object anymore. We'll stipulate.

T 2/10/06 p 52 l 17- p 53 l 3.

In the next quote, the prosecutor argues facts not in evidence – that if the defense had stipulated that the telephone call was a threat, then the kitchen sink material would not have come in. There is nothing in the record to support this, and defendant denies that the prosecution was in any way willing to enter into such a stipulation before or during trial. The prosecutor is laying the blame for introduction of the evidence and, implicitly, the length of the trial at defendant's feet. The prosecutor, as in the above quote, suggests that it is all gamesmanship on the part of the defense.

> Well, if the defense stipulates that whoever made that call -- whoever made that call was making a death threat, a threat of personal injury, a threat of property damage, malicious use of phone -- because it wasn't us. It wasn't me, Tod Houthoofd. Whoever did it to Detective VanHorn, that was a death threat. That was serious. And you jurors don't hear any of this other stuff because it's not relevant anymore. But, see, the defendant makes things relevant for the fight that he wants to have, for the game that he wants to play.

T 2/10/06 p 53 l 4- l 14.

The next quote regards Mr. Houthoofd's previous attorney, Matthew Reyes. He was not representing Mr. Houthoofd at the time of the trial, but he was linked throughout the case by the prosecution as a witness friendly to Mr. Houthoofd. In the following quote, the prosecutor disparages Mr. Reyes's plan to argue the third party culpability theory regarding Jim Franklin. There is absolutely nothing unethical about an attorney advancing a third party culpability claim, even if he personally does not believe that the third party committed the crime. Nevertheless, the

prosecutor continued his theme that legitimate defense theories were mere gamesmanship.

> But what did -- what did you believe to be the truth? Jim Franklin never made the call. I confronted him. Isn't that like saying black is white or up is down? I don't get this. And that was the interchange with him. And he felt perfectly comfortable not only with saying it then, saying it now to you, but had he gone to trial in October '04 and put Franklin in, he would have put it to the jury. I condemn that approach by either side, the prosecution or the defense, trying to put forward to a jury a false artifice, just a made-up story. But when you're desperate, when you're getting paid that much money, you do foolish things.

T 2/10/06 p 62 l 24- p 63 l 11.

This next quote continues the theme that Mr. Houthoofd's attorneys were unethically concocting various false theories; in this quote, the prosecutor adds the additional claim that Mr. Reyes was going to such lengths because of the amount of money he was paid.

> No. Because even Mr. Reyes probably doesn't relish the thought of speaking perjury to you in front of a judge. He's content with an innuendo. He's content to throw it out there. Well, maybe. I -- I've heard about Detective VanHorn or I've dealt with Detective VanHorn. Well, what does that mean? It's got to mean something other than in my case where I'm being paid $80,000, or over time that much, by a criminal defendant whose goal is to get out of things, I guess I'm going to have to do something like that. So we bring in Franklin, and Franklin is going to be this person that says, I guess at that October retrial, I was in court with Detective VanHorn in June '04 on a criminal sexual conduct case and I was acquitted, and that really ticked him off.

T 2/10/06 p 63 l 24- p 64 l 14.

In the following quote, the prosecutor returns to the theme of Mr. Reyes's use of Mr. Franklin in a third party culpability theory. Again, he disparages the defense arguing that it's "really wrong."

> Well, that could potentially screw up a jury. Was it Franklin or was it Houthoofd? And you heard Mr. Reyes say under oath I thought it was equally likely they both did it, but I didn't think Franklin did it. I have no evidence Franklin did it. I don't think Franklin made the call. Well, the only reason he would call Franklin is to try to engender in the mind of the jury that he did make the call. But if Franklin comes in and says I didn't make the call, then all he was doing was trying to throw a red herring. It's his client. He really can't sacrifice his client. That's really wrong.

T2/10/06 p 64 l 22- p 65 l 8.

In the next quote, the prosecutor argues that Mr. Reyes said he knew that Mr. Franklin didn't make the call. This is not true. Mr. Reyes did not believe that Franklin made the call, but that is far from the insinuation that Mr. Reyes was advancing false evidence.

> Then, of course, if Mr. Franklin raised his hand and said, I'm sorry, I made the call, and completely exonerate Mr. Houthoofd on that threat case, with Mr. Reyes representing Mr. Houthoofd here in October of '04, wouldn't Mr. Reyes have been in an incredibly difficult, ethical situation since he's already said I know Franklin didn't make the call? But you know what? When you're trying to engender confusion and chaos, it doesn't matter that there's no theme. It doesn't matter that there's a plot. All you've got to do is raise a doubt.

T 2/10/06 p 65 l 18- 66 l 3.

In the next quote, the prosecutor again argues facts not in evidence, and again tries to read the mind of the defense attorney. He states that Mr. Reyes was thinking after the threatening phone call that Mr. Houthoofd was not following advice well because Mr. Houthoofd allegedly made the threatening phone call. Mr. Reyes testified quite clearly that he did not believe that Mr. Houthoofd made the call.

> But when this threat thing came up, he wasn't content to sit and wait to see if the dismissal came. Pow! He makes the threat. Now Mr. Reyes is thinking, you're not following advice very well. That did not help you.

T 2/10/06 p 79 l 1-5.

Defense counsel objected to the following statement, and it was sustained, but because it is consistent with the pervasive arguments regarding defense counsel's allegedly nefarious plot regarding using Mr. Franklin, it is also justification for reversal.

> Is it significant that, unlike Mr. Reyes, either of these attorneys is willing to put Mr. Franklin here before you as a witness?

T 2/10/06 p 83 l 25- p 84 l 2. (There was an objection that was sustained).

The kitchen sink material was supposedly admitted to explain VanHorn's state of mind. Nevertheless, the prosecutor in the next quote questions the very propriety of owning the material – or the "crap" as the prosecutor termed it.

> Ask yourself, why he is collecting this crap? Do you collect that stuff? Does anybody collect that stuff? I've collected articles I'll admit. I just don't know that I've ever seen that kind of a collection.

T 2/10/06 p 87 l 11-15.

In the next quote, despite the prosecutor's alleged theory of the admission of the kitchen sink material and despite the prosecutor's acknowledgment that he could not and did not have to prove a link to Mr. Houthoofd, the prosecutor spreads on the record again the allegation that Mr. Houthoofd "caved in" the head of his former boss at GM and blew up his house.

> GM had a problem child, didn't they? They had to figure out what to do with the person. Unfortunately for them in management, they didn't carry through records from Toledo up to here, so nobody in Bay City had any information that he was fired from his job for a false and malicious and scandalous thing that he did against a management person that got him fired. Nobody had information until 2001 that the person who signed that discipline had his head caved in and got brain damage, and that three years later, after the defendant was already working at GM Powertrain in Bay City, a pipe bomb went off at his house. Nobody knew that until Mr. Mayne, the head of the GM plant over there, or one of the supervisors, happened to talk with Bob Griffith, the man who had been injured and had -- his house had been blown up.

T 2/10 /06 p 89 l 21- p 90 l 11.

Here, the prosecutor accuses defense counsel of attempting to misrepresent the law.

> And one of the things he said earlier in his argument was you can't convict if you have a doubt. And then his voice trailed off and he sort of walked away and he said based on reason. He doesn't want you to hear the word reasonable doubt.

T 2/10/06 p 180 l 12-16.

The next quote is a twisting of the record to again disparage defense counsel's theories as gamesmanship. The prosecutor stated that defense counsel's theory that GM was out to get Mr.

Houthoofd "was a waste of everybody's time." In an attempt to deal with the improperly admitted kitchen sink material Mr. Houthoofd's attorneys did advance this theory, and the prosecutor disparages defense counsel for it.

> Mr. Piazza said the prosecution brought up the GM thing and tried to show GM is out to get the defendant. Something you may have gathered as a result of the way the case has been tried is that the prosecution was allowed to put in certain evidence that would normally not be allowed, and that when the defense attorneys objected to it, you heard the judge say we've ruled on this. This is resolved. It's coming in. But they wanted to let you know, and they have the right to, to let you know they have objections to certain of the evidence. And that's when that time line of accusations came in. But something happened in the opening statement of Mr. Piazza that I didn't open, that I didn't plan on ever being an issue in this case, but has become an issue because of the defendant's choice, and that is GM is out to get him. Now, the prosecution was allowed to put in the background of what people at GM have been harmed by somebody and where the defendant was suspected of harming; because that would explain why Detective Sergeant VanHorn considered the threat on the phone a death threat, a threat to come to his house. But the thing about GM being out to get this good alternate committeeman for the UAW, that's really something cooked up by Mr. Piazza in his opening statement. Having heard it, and you again witnessed part of this -- not all of it was out of your presence. Some of it was in your presence. When I would try to respond and say, well, that's the gauntlet that's been thrown down, we've got to respond, the Judge ruled you opened the door. You said these things, Mr. Piazza. They get to respond. Frankly, I thought that was a waste of everybody's time. But the defense has the right to choose how to defend. I can't tell them that they're limited. And that was the choice made. That's why you heard the GM stuff. That's why you have all this stuff about his interaction with GM. It would have never been put out there but for that.

T 2/10/06 p 181 l 16- p 183 l 5.

The next quote is the first in a series in which the prosecutor makes references to terrorism, 9/11, and Iraq, linking Mr. Houthoofd to the terrorists with whom we are currently at war. This quote is mild by comparison to the others but gets the ball rolling by referring to the alleged pipe bomb seized from Mr. Houthoofd as an "improvised explosive device."

> There's an explosive permit, which we put into evidence, which indicates -- and it's expired by the time of November 2001. But he had an explosive permit. There's nothing in that explosive permit that says go home, make yourself a pipe bomb, an

improvised explosive device or bomb; which Agent Gonzales, from the laboratory at ATF, says this is what you use to create a device that will injure people or kill people when metal starts flying out in all directions when it blows up.

T 2/10/06 p 206 l 11-20.

In the next quote, the prosecutor accuses Mr. Reyes of violating his ethical duties as a lawyer by advancing facts he knew to be false regarding the Franklin theory. He again relates it to the amount of money that Reyes was paid.

> See, we lawyers take a lot of oaths, too. You had to swear an oath to do what you do. We have to take a Constitutional oath. We have to uphold the Constitution. We have to take an oath as a lawyer that we'll not submit any false artifice of fact or law to a judge or jury. And that's really what was happening in the way he handled the Franklin connection to the Houthoofd case. He got caught in it and he knows it, and he was under oath. And he told you not only from the hearing that was read back in your presence with me asking him questions and him repeating the answers he gave a year ago, but in court to you. He was caught and he knows it. He was paid a lot of money. And you know what? They don't expect you as a defense attorney to get paid that kind of money and not have the jury stand up and say not guilty.

T 2/10 /06 p 214 l 5-21.

The following is the second in an increasing number of references to 9/11, Iraq, and terrorism linking Mr. Houthoofd to the terrorists.

> Boo! That's why Detective Sergeant VanHorn can be scared; because who is going to get you or your family at your home? It's not something you can predict ahead of time. If we had known that planes were flying to the World Trade Center, we wouldn't let it happen. And even while it was happening, more planes were flying into other things like the Pentagon, and one was headed for Washington. You can't stop all this stuff, because sometimes an evil-doer can beat you. Sometimes good doesn't win.

T 2/10/06 p 217 l 9-18.

In this last quote, the prosecutor wraps up the theme that Mr. Houthoofd is a terrorist. The prosecutor linked Mr. Houthoofd to the "people who engage in terroristic activities" who have attacked our country and have maimed and killed our soldiers using "improvised explosive

devices."

> Remember what the judge said when there was some groaning in the room at the beginning of January that this might go three weeks? She didn't even want to hear anybody bark about it. She didn't want to see any hands go up to tell her that was a hardship. She said there are people -- and I think this was just from her heart, off the cuff. There are people from our country in Iraq fighting to get freedom for them and to protect our freedom, which was taken away to a certain extent years ago by people who engage in terroristic activities. Soldiers in that situation have had to endure improvised explosive devices, bombs going off and maiming and killing them. And that's pain and destruction and chaos.

T 2/10/06 p229 l 22- p 230 l 11.

F. Defendant was denied his constitutional right to the effective assistance of counsel where his trial attorneys failed to object to the prosecution's improper closing argument.

Standard of Review/Issue Preservation

This issue was preserved on remand from the Court of Appeals. *People v Ginther*, 390 Mich 436, 443 (1973).

Discussion

Trial counsel's failure to object to the prosecutor's improper conduct constitutes ineffective assistance of counsel. The accused's state and federal constitutional rights to counsel include the right to the effective assistance of counsel. US Const, Am VI; Const 1963, Art 1, § 20; *Powell* v *Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932), *People* v *Pickens*, 444 Mich 298; 521 NW2d 797 (1994). Defense counsel's failure to object to prejudicial remarks during trial can constitute ineffective assistance of counsel. *People v Means (On Remand)*, 97 Mich App 641; 296 NW2d 14 (1980) (failure to object to prejudicial remarks by the prosecutor, to move for a hearing on the voluntariness of client's confession, and to move for exclusion of in-court identification).

In *Washington v Hofbauer*, 228 F3d 689 (CA6 2000), the Sixth Circuit found ineffective

assistance of counsel where defense counsel failed to object to prosecutorial misconduct during closing argument. The Court held, "The prosecutor's tactics and challenged statements amounted to unfair and prejudicial misconduct plainly meriting an objection and curative instruction, yet [defense counsel] sat silent ... [H]is silence was due to incompetence and ignorance of the law rather than as part of a reasonable trial strategy." *Id.* at 703.

In the case at bar, there was no legitimate reason for the trial attorneys' failure to object to all the instances of prosecutorial misconduct. Through his improper actions and arguments, the prosecutor diverted the jury from objectively appraising the evidence. Because the prosecutor's concerted pattern of misconduct successfully resulted in conviction, there was simply no valid defense trial strategy for failing to object. Counsel cannot have a legitimate strategy to permit the prosecution to spread obloquies on the record.

As described in the statement of facts above, the trial attorneys for Mr. Houthoofd gave slightly different reasons for their failure to object. Mr. Petrick testified uniformly that he did not recall if he found the statements in closing argument objectionable. Given this testimony, it is impossible to discern any strategy that would justify a failure to object. Mr. Piazza's testimony was more helpful in that he testified that he thought some statements were not objectionable or were close calls. If this Court disagrees with Mr. Piazza's assessment, then his failure to object based on his misjudgment of the objectionableness of the statements would be unjustified as a lack of knowledge about the applicable law. Also, Mr. Piazza's testimony about the innumerable objections that he did offer to some of the material that formed the basis of the statements and the trial court's admonition to stop objecting is notable. But to the extent that he had a continuing obligation to prevent the prosecution from spreading obloquies on the record, it was not reasonable to allow these improper statements before the jury unchallenged.

Defendant prays that this Court reverse and remand for a new trial.

G. The trial court erred in sentencing Mr. Houthoofd to a minimum sentence that exceeded the scored guidelines range without legal justification for the departure or the extent of the departure.

Standard of Review and Issue Preservation

A trial court must have substantial and compelling reasons to depart from the statutory sentencing guidelines. MCL 769.34(3). To determine if substantial and compelling reasons exist, a court must rely solely on factors that are objective and verifiable. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Furthermore, a court shall not justify a departure based on an offense or characteristic which has already been taken into consideration by the sentencing guidelines, unless the court finds that the particular characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b).

The existence or nonexistence of a particular sentencing factor is a factual determination which is reviewed for clear error. *Babcock,* 469 Mich at 273. Whether a particular factor is objective and verifiable is a question of law and shall be reviewed de novo. *Babcock,* 469 Mich at 264. Finally, the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id.* at 265. An abuse of discretion will be found when the trial court selects a sentence which falls outside the range of reasonable and principled outcomes from which one would expect a reasonable trial judge to select. *Id.* at 269. If the Court determines that the trial court did not have substantial and compelling reasons for departure, then the case shall be remanded to the trial court for resentencing. MCL 769.34(11)

In this particular case, the issue of sentencing error was not preserved at the trial level. However, preservation is not a prerequisite for appellate review in this case, as the sentence

imposed is outside of the sentencing guidelines range. *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669, 672 (2004).

Discussion

In its opinion, the Court of Appeals wrote that "the [trial] court exceeded the guidelines for the solicitation to commit murder conviction, sentencing defendant to 40 to 60 years' imprisonment." In a footnote the court wrote, "As previously explained, we must vacate defendant's conviction and sentence for solicitation to commit murder. Therefore, defendant's arguments regarding that sentence are moot." Mr. Houthoofd was also sentenced to an extreme upward departure on the intimidation of a witness and false pretenses convictions. Mr. Houthoofd raised in his brief the issue of the trial court's upward departure from the guidelines (see issue H in his opening and reply briefs). While Mr. Houthoofd framed the issue as it regarded the solicitation conviction because at the time that was his controlling sentence, he stated that the departure was disproportionate to the "crimes" (plural) for which he was convicted.

> Mr. Houthoofd has no previous felony convictions. The crimes in this case for which he stands convicted are serious, but not anymore so than other equally serious offenses of a similar nature. The legislature has determined a range of appropriate sentences for defendants convicted of crimes similar to Mr. Houthoofd's, and the trial court should have kept its sentence within the range.

Appellant's Brief, p. 48.

Mr. Houthoofd received a 40 to 60 year sentence on the solicitation conviction, concurrent with the other sentences. The maximums of Mr. Houthoofd's lesser sentences were lower than the minimum on the solicitation conviction, so Mr. Houthoofd concentrated his argument on the solicitation sentence. Nevertheless, the sentences for the intimidation and false pretenses cases were equally extreme upward departures. Not accounting for objections to the scoring of the

variables, the parties agreed at sentencing that the guidelines range as scored by the court for the intimidation charge was 19 to 38 months. 3/21/06 T 38. The false pretenses case had an even lower range. Nevertheless, the trial court sentenced Mr. Houthoofd to a 120 month minimum on the intimidation conviction and 60 months on the false pretenses case. The 120 month minimum is 315% of the maximum allowed under the guidelines; the false pretenses case is an equally massive departure. Mr. Houthoofd objects to both of these sentences.

Judge Heathscott gave the following reasons for her departure: (1) Mr. Houthoofd was dangerous. T 3/21/06 73, 75; (2) Even if Mr. Houthoofd got a lobotomy he would attempt similar crimes in the future. T 3/21/06 74; (3) Mr. Houthoofd could not be rehabilitated. T 3/21/06 75.

The trial court erred when it used its determination that Mr. Houthoofd is a dangerous individual as a basis for ordering a sentence which drastically departs from the sentencing guidelines. A trial court's conclusion that a defendant is a danger to himself and the public is not an objective and verifiable factor. *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). Objective and verifiable facts are external to the minds of the judge and the defendant, and must be capable of being confirmed. *People v Hines*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 18, 2003 (Docket No. 242391) (attached in Exhibit D) (citing *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003)). In *Hines*, the court relied on *Babcock* and concluded that labeling an offense dangerous is subjective because it is a determination which really is an evaluation done internally in the mind of the trial judge and thus is not capable of external proof. The court stated, "Therefore, it is not objective and verifiable and cannot be used as a substantial and compelling reason for departure from the sentencing guidelines." *Id.*

In a case involving a crime more serious than the crime in this case, the Court of Appeals

remanded a case for resentencing based on a finding that the sentencing guidelines offer society adequate protection from criminal defendants. The trial court in *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 29, 2004 (Docket No. 232255) (attached in Exhibit D), sentenced the defendant, who had been convicted of second degree murder, to 480 to 1,020 months, an upward departure from the sentencing guidelines range of 225 to 375 months. The trial court cited numerous reasons, including the need to protect society from such a dangerous individual. In remanding the case for resentencing, the court stated, "Neither of these factors are objective or verifiable. Additionally, from neither defendant's behavior nor his prior criminal history can we discern any special need to protect society beyond that which is accomplished by sentencing defendant within the guidelines." *Id.*

In addition to the "dangerousness" factor cited by the trial court, the court also listed two other reasons for departure. One of them was the judge's opinion that Mr. Houthoofd could not be rehabilitated. The other was a blend of the dangerousness and rehabilitation factors – namely that even if Mr. Houthoofd got a lobotomy he would attempt similar crimes in the future. Departures based on the risk that the defendant will become a repeat offender or the defendant's future dangerousness are subjective. *See People v Flint*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2004 (Docket No. 246032) (attached in Exhibit D).

The trial court did not provide substantial and compelling reasons based on objective and verifiable factors. In fact, the trial judge had to be reminded by the prosecutor at the very end of the sentencing hearing to make the necessary findings, at which point the judge simply referenced the comments that she had already made.

> MR. DUGGAN: Your Honor, are the reasons you gave before the sentence the ones that you would count as substantial and compelling reasons for guideline exceeding if that's the case?

THE COURT: I don't know how they could get any more substantial and compelling.

MR. DUGGAN: You didn't say the magic words. I wanted to make sure. Thank you.

3/21/09 T 76.

Additionally, the extent of the departure must be proportionate to both the seriousness of the offense and the culpability of the offender. "The trial court must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is not necessarily justified by substantial and compelling reasons." *Babcock,* 469 Mich at 262. Mr. Houthoofd has no previous felony convictions. The crimes in this case for which he stands convicted are serious, but not anymore so than other equally serious offenses of a similar nature. The legislature has determined a range of appropriate sentences for defendants convicted of crimes similar to Mr. Houthoofd's, and the trial court should have kept its sentence within the range. By failing to do so the trial court imposed a disproportionate sentence on Mr. Houthoofd.

In addition, this Court issued *People v Smith*, 482 Mich 292 (2008), three days after Mr. Houthoofd filed his reply brief. The central premise of *Smith* is that a sentencing court must provide a record explanation "for the extent of the departure independent of the reasons given to impose a departure sentence" (*id.* at 306; emphasis in original), and that a sentence "cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear" (*id.* at 304). At oral argument in Mr. Houthoofd's case, in response to a direct question from Judge Borrello about the effect of *Smith* on Mr. Houthoofd's case, the prosecutor conceded that he was not satisfied with the way that the trial court handled the

sentencing and had wanted better justification from the court for its departure. COA Oral Argument, pp. 43-45. *McCaskill v SCI Mgmt. Corp.*, 298 F3d 677, 680 (CA7 2002) ("The verbal admission by SCI's counsel at oral argument is a binding judicial admission, the same as any other formal concession made during the course of proceedings.").

Comparison of the applicable grids for Class C offenses (the proper class for the intimidation conviction), as Justice Kelly did for second-degree murder in her majority opinion in *Smith*, shows that the extent of deviation in this case is disproportionate. In *Smith*, the departure corresponded to a defendant with a much higher prior record variable or offense variable score. In Mr. Houthoofd's case, there is *no* sentencing grid for intimidation of a witness that permits a minimum sentence of ten years absent a habitual enhancement. As the *Smith* Court noted, the sentence in this case is literally "off the charts."

Mr. Houthoofd's only points for the PRVs, similar to the defendant in *Smith*, were due to the multiple convictions in the case at bar and his relationship to the criminal justice system (PRV 6 related to being incarcerated or on bond while the offense is committed). He has no other criminal record that was scorable under the guidelines.[4] As to the offense variables, his total OV score of 25 points put him only in level III whereas the highest possible level was a VI. This was not a case, as posited by Justice Kelly, where a defendant scores vastly higher under the OVs than the total necessary to reach the top level (Justice Kelly pointed out that hypothetically a defendant could score 590 points for crimes against a person if scored at the highest level on all applicable offense variables).

In sum, the trial court sentenced Mr. Houthoofd to a minimum sentence that is not possible absent a departure for even a hypothetical defendant with the highest PRV and OV total for a Class

[4] He has one twenty-five-year-old expunged conviction.

C offense. The trial court made this decision despite the fact that Mr. Houthoofd's guidelines range was in the lowest quadrant of the grid, and it made this decision based on reasons that were not objective and verifiable nor substantial and compelling and without attempting to justify the extent of the departure.

If this Court finds that Mr. Houthoofd did not preserve this issue because he argued in the Court of Appeals primarily about his solicitation sentence which has been vacated, then he is entitled to relief under an ineffective assistance of appellate counsel theory. Mr. Houthoofd maintains that the issue was sufficiently preserved and that because *Smith* post-dated the briefing in this matter, he is entitled to the benefit of that new rule of law. Nevertheless, any failure to preserve the sentencing issue falls squarely on undersigned counsel. Mr. Houthoofd had no part in restricting the sentencing issue to the solicitation charge. Errors by appellate counsel during a direct appeal can be cured during that appeal, without delaying relief until a motion for relief from judgment can be filed and litigated. For instance, in *People v Rusiecki*, 461 Mich 947; 607 NW2d 357 (2000), defendant pled guilty of one count of CSC 3rd. Appellate counsel filed an untimely application for leave to appeal. The Court of Appeals dismissed that application, stating:

> [A]ppellant failed to file the application within the time period required by MCR 7.205(F)(3). Furthermore, the exceptions found in MCR 7.205(F)(4) are inapplicable because the application was not filed within 21 days of the order denying a timely postjudgment motion.

Id. This Court stated that the Court of Appeals had correctly determined that defendant's application was untimely in that case. *Id.* This Court, however, went on to state that defendant might still be entitled to relief if he could establish ineffective assistance of counsel. *Id.* This Court remanded that case to the trial court for a determination of whether appellate counsel had been ineffective for failing to meet the deadline. In addition, Justice Cavanagh, joined by Justice

Kelly, stated:

> Pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, I would vacate the Court of Appeals orders . . . would remand the case to the Court of Appeals and direct that Court to treat defendant's application as having been timely filed, and then to either grant or deny the application.

Id. Undersigned counsel wrote the brief in Mr. Houthoofd's case; he had no strategic purpose in appealing only the departure on the solicitation conviction. If the only reason that Mr. Houthoofd does not get relief is because of the way that counsel wrote the brief, then counsel was ineffective and Mr. Houthoofd is entitled to relief.

Mr. Houthoofd's sentences on all convictions are massive upward departures from the guidelines ranges. He has already served approximately six years of his sentence – more than is permissible under the guidelines as scored without a valid departure. In other words, *Mr. Houthoofd has already served an upward departure in this case.* He will suffer significant prejudice if he is required to serve the remainder of an impermissible departure, or if he is forced to raise the issue in a motion for relief from judgment and wait months or years for relief from that process.

H. Mr. Houthoofd was denied his Sixth Amendment right where the trial court sentenced him based on facts not found beyond a reasonable doubt by a jury.

Standard of Review and Issue Preservation

This issue was preserved by repeated objections at sentencing. This Court reviews constitutional issues *de novo.* *People v Hill,* 257 Mich App 126, 149-50 (2003).

Discussion

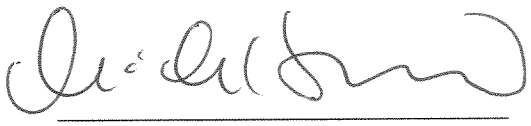
None of the elements of Mr. Houthoofd's convictions include findings related to the scoring of the offense variables. In *Blakely v Washington,* 542 US 296 (2004), the United States Supreme Court held that Washington State's sentencing scheme violated the Constitution

because it allowed for an imposition of a maximum sentence based on facts not found beyond a reasonable doubt by the jury. Under the rule of *Blakely,* the application of Michigan's sentencing scheme to Mr. Houthoofd is constitutionally invalid. Appellant acknowledges that this Court has held that the rule of *Blakely* does not apply in Michigan. *See People v Drohan,* 475 Mich 140 (2006). Nevertheless, Appellant maintains his objection based on United States Supreme Court precedent. For these reasons, Mr. Houthoofd prays that this Court remand for a resentencing.

VII. Conclusion

Mr. Houthoofd prays that this Court vacate and dismiss his convictions, or, remand for a new trial, or, remand for resentencing.

Respectfully submitted,



Michael Skinner (P62564)
Law Offices of Michael Skinner
27 E. Flint Street
Lake Orion, Michigan 48362
(248) 693-4100
Attorney for Defendant-Appellant

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